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04-44 JUL 7 2004

No. 04-_____

IN THE

Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

THOMAS RAMSEY,

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court determining damages for lost wages under the Federal Employers' Liability Act must admit evidence that the employee's gross income would have been reduced by federal railroad retirement taxes.

RULE 29.6 STATEMENT

Petitioner The Burlington Northern and Santa Fe Railway Company is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation.

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The Burlington Northern and Santa Fe Railway Company respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is reported at 130 S.W.3d 646 (Mo. App. 2004) and is included in the Appendix at App. 1a-15a. The unpublished order of the Missouri Supreme Court denying BNSF's application for transfer is not reported and is included in the Appendix at 16a.

JURISDICTION

The decision of the Missouri Court of Appeals was entered on February 3, 2004. BNSF filed an application to transfer the case to the Supreme Court of Missouri. The Missouri Supreme Court denied the application on April 27, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Federal Employers' Liability Act ("FELA") provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States ... shall

> be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of ... such carrier, or by reason of any defect or insufficiency, due to its negligence, in its [equipment].

45 U.S.C. § 51.

The Railroad Retirement Tax Act provides, in pertinent part:

> Rate of Tax
>
> (a) Tier 1 tax.--In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means [7.65%] under subsections (a) and (b) of section 3101 for the calendar year.
>
> (b) Tier 2 tax.--
>
> (1) In general.--In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee.
>
> (2) Applicable percentage.--For purposes of paragraph (1), the term "applicable percentage" means--(A) 4.90 percent in the case of compensation received during 2002 or 2003, and (B) in the case of compensation received during any calendar year after 2003, the percentage determined under section 3241 for such calendar year.

26 U.S.C. §§ 3201(a), (b).

STATEMENT

In *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), the Court addressed how federal income taxes should be treated in a claim for lost wages under the FELA. This Court held that federal income taxes should be subtracted from gross wages, because after-tax income yields the only realistic estimate of the wage earner's ability to support his family. Since *Liepelt*, a similar issue has arisen with respect to railroad retirement taxes. These federal taxes, analogous to Social Security taxes, comprise 12.55% of an railroad employee's earnings -- often more than the income taxes at issue in *Liepelt*. Some courts have held that the same logic applies to these taxes. However, other courts, particularly state courts, have refused to deduct railroad retirement taxes from gross income in computing damages. This refusal to admit evidence of railroad retirement taxes allows the employee to be overcompensated by recovering the 12.55% of his income that he concededly never would have received had he been able to work. This petition presents the question of whether a court can exclude evidence of the effect of railroad retirement taxes on the employee's future earnings.

A. Railroad Retirement Taxes

The Railroad Retirement Act (RRA) is "substantially a Social Security Act for employees of common carriers," including railroads. *Eichel v. New York Central R.R. Co.*, 375 U.S. 253, 254 (1963). Railroad retirement taxes are paid by the employee and employer to fund the retirement benefits. Like other taxes paid on earnings, the employee's portion of the railroad retirement tax is withheld from the employee's paycheck and thus is money that the employee does not take home for the support of his family. *See* 26 U.S.C. § 3201(a); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75 (1979); *Eichel*, 375 U.S. at 254. Similarly, the

employer's portion of the railroad retirement tax is paid directly to the federal government. 26 U.S.C. § 3202(a).

The amount of railroad retirement taxes to be paid by each employee and his employer is fixed by statute, and is therefore easily ascertainable. Exactly as in Social Security, the employer and employee each pay 7.65% of the employee's compensation for Tier I taxes. The employee pays an additional 4.9% for Tier II, or a total for all Railroad Retirement Board taxes of 12.55% of his or her gross wages. The employer pays an additional 15.6% of the employee's gross compensation for Tier II taxes, so that the employer pays directly to the Railroad Retirement Board an additional amount totaling 23.25% beyond the gross compensation paid to the employee. Like the Social Security System for non-railroad workers, the payment of Tier I and Tier II railroad retirement taxes is mandatory, not discretionary.[1]

The amount paid in railroad retirement taxes bears no relation to the amount of the employee's annuity. "Like a social welfare or insurance scheme, the [railroad retirement] taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled." *Hisquierdo*, 439 U.S. at 574-75. There is no separate amount of money set aside in each employee's name. Instead, the federal taxes merely entitle the employee to draw benefits at some future point in accordance with a set formula. Those benefits are established and can be modified by Congress. They are not related to the amount of taxes paid into the fund. *See id.*

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[1] *See* 26 U.S.C. § 3201 ("there is hereby imposed on the income of each employee a tax"); *id.* § 3221 ("there is hereby imposed on every employer an excise tax").

B. The Proceedings Below

Respondent Thomas Ramsey instituted this action under the FELA against his employer, petitioner BNSF, for injuries he sustained after falling on a locomotive walkway. App. 3a. FELA grants railroad employees, and their beneficiaries, a federal right to recover "damages" from their employers for injuries or deaths caused, "in whole or in part [by] the negligence of any of the [railroad's] officers, agents, or employees ...." 45 U.S.C. § 51. The jury found BNSF negligent in the maintenance of the walkway, and that ruling is not challenged here. App. 4a.

On damages, Ramsey introduced evidence of his work-life expectancy and annual gross earnings in order to demonstrate his estimated lost future income. App. 3a-4a. Ramsey did not proffer any evidence of his loss of any railroad retirement pension annuity under the RRA, nor did BNSF ever object to the introduction of such evidence. App. 8a. BNSF contended that the impact of railroad retirement taxes should be considered in calculating Ramsey's lost future wages, and therefore sought to present evidence of the amount of railroad retirement taxes that would regularly have been deducted from his paycheck until his presumed date of retirement. App. 7a. Thus, BNSF proffered evidence showing that Ramsey paid $6,535, $6,069, $6,109 and $5,850 in railroad retirement taxes in the years 1996, 1997, 1998 and 1999. The trial court refused to permit this evidence. App. 3a-4a.

BNSF also argued that it should be allowed to show benefits Ramsey actually received from the Board. Ramsey qualified for and was receiving a Railroad Retirement Board Disability pension which was $24,000 annually, approximately 50% of his former annual earnings. 45 U.S.C. § 231a(a). The trial court refused to permit a showing of this benefit received, while at the same time permitted Ramsey to claim as a loss the railroad retirement taxes. App. 3a-4a.

Finally, BNSF proposed an instruction based on *Liepelt* that said: "The measure of plaintiff's wage loss must be calculated from his after-tax income." App. 12a. The trial court refused to give this instruction. *Id.* The jury awarded Ramsey $1.4 million in a general verdict. App. 4a.

The Missouri Court of Appeals affirmed. App. 1a-15a. The court recognized that, under *Liepelt*, "plaintiff's after-tax income, not his gross income, ... is the proper measure of damages." App. 7a. However, the court viewed *Leipelt* as applicable only to "income taxes ... and not railroad retirement taxes, which are of a different character" because they are paid in part toward the retirement annuity. *Id.* The court of appeals found that the trial court was not required to admit evidence of railroad retirement taxes because Ramsey had made "no claim for lost retirement benefits." App. 8a.

BNSF also argued on appeal that, by claiming damages for taxes payable to the Railroad Retirement Board, Ramsey had "opened the door" to testimony concerning benefits received from the Board. Specifically, the railroad argued that it should have been allowed to establish for the jury that Ramsey was actually receiving monthly railroad disability benefits from the Board. The court refused this request as well. App. 11a. Finally, the court of appeals rejected BNSF's proposed instruction, directing the jury to take into account only after-tax income. The court asserted that *Liepelt* "dealt only with the taxability of the jury's award" and said "nothing about deducting income taxes from wage loss calculations." App. 12a-13a. The court alternatively held that BNSF suffered no prejudice from the refusal to give that instruction. App. 13a.[2]

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[2] The court of appeals remanded for the ministerial task of reducing the judgment by the amount that the railroad has already paid toward Ramsey's medical expenses. App. 14a-15a. The trial

(Continued ...)

Pursuant to Missouri procedure, BNSF filed in the Missouri Court of Appeals an application to transfer the case to the Missouri Supreme Court. When this application was denied, App. 17a, BNSF applied directly to the Missouri Supreme Court. This application was also denied. App. 16a.

REASONS FOR GRANTING THE PETITION

The decision of the Missouri Court of Appeals raises a significant question with respect to the uniform calculation of damages under the Federal Employers' Liability Act and similar federal statutes. The court refused to permit the subtraction of payroll taxes -- in this case, railroad retirement taxes -- in determining future income streams. That ruling is flatly inconsistent with the principles set forth in *Liepelt* and subsequent decisions of this Court.

The decision below also deepens the disagreement among the state and federal courts in their interpretation of *Liepelt*. Two federal circuits, at least three state courts and several federal district courts have held that payroll taxes, such as social security and the railroad retirement taxes, must be deducted in determining lost wages. Four state courts, however, have rejected this view. Other courts, including the court below, have adopted still another view and ruled that evidence of railroad retirement taxes does not have to be admitted when the employee makes no claim for lost retirement benefits. Thus, the courts are in disarray in their

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court entered a revised judgment on June 7, 2004. The remand order does not affect the finality of the state court judgment for purposes of this Court's review. *Pope v. Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 382-83 (1953); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 215 (1977); R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE, 151-59 (8th ed. 2002).

interpretation of *Liepelt*. As a result, employees and their employers now receive highly variable treatment in the calculation of federal damages awards depending upon the forum.

The payroll tax issue is significant and recurring. Since all railroad employees pay railroad retirement taxes, the issue arises in virtually every FELA case. It also arises in cases under similar federal statutes modeled on the FELA, such as the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act, and the Death on the High Seas Act. Permitting some courts to ignore the effect of payroll taxes on future income streams destroys the uniform application of federal law. It also overcompensates the employees, by compensating them on a tax-free basis for sums that they would never have received if they had continued to work. This case is a particularly appropriate vehicle to consider these issues, in that the employee here not only received compensation for his taxes from which he was excused, but also was receiving substantial benefits from the Board to which the taxes would have been paid. For these reasons, review by this Court is both appropriate and necessary.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING THE USE OF NET, AFTER-TAX INCOME FOR COMPENSATORY DAMAGES

This Court has made clear that damages in FELA cases are determined by federal law. "It has long been settled that questions concerning the measure of damages in an FELA action are federal in character." *Liepelt*, 444 U.S. at 493. The Court has also taken a series of steps to assure that FELA damages can be calculated with precision. Thus, it has decided that taxes are not to be included, *Liepelt*, 444 U.S. at 493-96, spoken directly to the discount rate used for present valuation, *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) (*per curiam*), and eliminated any

prejudgment interest, *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335-39 (1988). "[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

Among the uniform federal rules that this Court has established with respect to FELA cases is that FELA claimants should recover based on the "realistic measure" of their future income. *Liepelt*, 444 U.S. at 493. In *Liepelt*, this Court held that the trial court must instruct the jury that the FELA award is not taxable income. *Id.* at 498. It further held that wage loss consists of "the damages ... [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received." *Id.* at 493 (citation and internal quotation marks omitted). Because "[t]he amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government," it is his "after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." *Id.* In *Liepelt*, the Appellate Court of Illinois had affirmed a state trial court's decision prohibiting the introduction of evidence showing how much income tax the claimant would have paid from his projected gross income. This Court reversed, holding that the evidence should have been presented in order to prevent "overcompensating the plaintiff." *Id.* at 498 (citation and internal quotation marks omitted).

This Court has already recognized that *Liepelt* is not limited to income taxes. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), this Court held that not only income taxes but any avoided costs (including such items as the purchase of uniforms) should be deducted from a claimant's estimated lost income. *Id.* at 534. *Pfeifer* was a

case arising under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), an analogous statutory scheme. The ruling in *Liepelt* has become a "federal common law rule," *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), designed to ensure that plaintiffs are treated fairly, but not overcompensated. *Id.* at 486-87. This Court has required trial courts to allow factfinders to hear evidence regarding deductions to gross future income streams in order to ensure that damage awards fully reimburse employees for their lost earning power, but do not "lead to the plaintiff recovering a windfall award." *Id.* at 487 n.16.

The Missouri decision below artificially limits this Court's holdings to deductions for self-described "income taxes." App. 7a. This contravenes the basic reasoning of these decisions. In the first place, railroad retirement taxes *are* a form of income tax. This Court has held that deductions under the Railroad Retirement Tax Act are, in fact, "[c]ompulsory federal taxes" on income. *Hisquierdo*, 439 U.S. at 582. The RRTA itself clearly imposes the tax "on the income of each employee ...." 26 U.S.C. § 3201. Second, it is undisputed that Ramsey's income prior to his injury was reduced by these mandatory federal railroad retirement taxes in the amount of 12.55%. This significant reduction in gross wages simply cannot be ignored in arriving at a realistic measure of his lost future income stream. Regardless of how railroad retirement taxes are characterized, permitting railroad employees to recover for these taxes results in overcompensation just as surely as allowing them to recover for the specific taxes at issue in *Liepelt*.

The unfairness is particularly apparent in this case. Here, the plaintiff was not only allowed to count his projected Railroad Retirement Board taxes as lost income. He was also able to exclude from the jury's consideration the fact that he

had income, not losses, from the Railroad Retirement Board. As a disabled employee, Ramsey qualified for and received a Railroad Retirement Board Disability pension. That pension, in the amount of $24,000, was four times larger than his annual Railroad Retirement Board tax payment.[3] The railroad argued that Ramsey had "opened the door" to the admissibility of this annuity from the Board by claiming Tier I and Tier II tax payments as a lost fringe benefit. The courts below refused to allow the jury to hear evidence about it. App. 11a. The erroneous resolution of that issue is fairly included in the question presented, since admission of the amount of disability annuity received from the Board would have been one means of mitigating the prejudice from the treatment of the Railroad Retirement Board taxes.[4]

In any event, given the disability pension, it is apparent that Ramsey was in no position to claim that his injury had

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[3] Ramsey, born in February 1950, will collect over $240,000.00 in disability pensions by the time he reaches the retirement age of 62.

[4] The court of appeals relied on *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253 (1963), which construed the Railroad Retirement Act as a "collateral source." However, these benefits are not "collateral," to the extent they are funded by BNSF. Plaintiff's expert admitted that the railroads fund two-thirds, or 66%, of Ramsey's disability benefits. In any event, Ramsey made this evidence probative in this case by claiming his railroad retirement taxes as a complete "loss," when in fact he was receiving benefits from the Board. *See McGrath v. Consol. Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998); *Barrera v. E.I. DuPont DeNemours and Co., Inc.*, 653 F.2d 915, 920-21 (5th Cir. 1981) (holding proof of similar benefits would be relevant for impeachment purposes, even if the benefits constituted "a collateral source").

led somehow led to losses with respect to the tax payments. This was double or even triple counting in the extreme. It was patently inequitable for Ramsey to claim his excused liability for Railroad Retirement Board taxes *as a loss* and at the same time to conceal from the jury his receipt of disability pension benefits of $24,000.00 per year from the Board.[5]

This case also presents a desirable vehicle for reviewing the impact of railroad retirement benefits because the trial court refused to give any instruction to the jury on the subtraction of taxes. In direct violation of *Liepelt*, the trial court refused to grant BNSF's request for an instruction that would have directed the jury to use net, after tax income as the base for damages. App. 12a-13a. Thus, the jury did not receive evidence about the amount of the railroad retirement taxes, nor obtain any inkling that its verdict was supposed to reflect the realistic measure of losses required by *Liepelt*, 444 U.S. at 493.

The court of appeals' decision in this case represents a marked deviation from this Court's teachings. Because it will continue to affect countless FELA damage calculations, this Court should grant review.

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[5] Altogether, the actions taken by the Missouri courts could have caused an enormous overstatement of loss. With railroad retirement taxes at $6,000 per year and at least thirteen years from the injury until retirement, Ramsey could receive compensation for approximately $78,000 in taxes that he was excused from paying. He was also allowed to conceal his expected receipt of $240,000 in disability annuities from the Railroad Retirement Board, for a total overstatement of $318,000.

II. THE DECISION BELOW WIDENS THE CONFLICT AMONG THE COURTS.

A. The Courts Disagree About Whether Railroad Retirement Taxes Should Be Deducted In Order To Calculate Lost Wages Under The FELA

The proper treatment of railroad retirement taxes under the FELA is a question of recurring importance on which the state and federal courts have adopted conflicting views. For example, immediately after *Liepelt*, the Illinois appellate court from which that case had emerged applied this Court's decision in holding that a trial court had erred in excluding evidence demonstrating the impact of the railroad retirement taxes on the injured railroad worker's future lost income. *Oltersdorf v. Chesapeake & Ohio R.R. Co.*, 404 N.E.2d 320, 324-325 (Ill. App. Ct.), *appeal denied* (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981). Federal and state courts in Illinois have continued to follow this approach. *See White v. Indiana Harbor Belt Railroad Co.*, No. 96 C 7154, 1998 WL 323625, at *2 (N.D. Ill. June 12, 1998); *Edwards v. Atchison, T. & S.F. Ry. Co.*, 684 N.E.2d 919, 923-24 (Il. App. Ct. 1997).

Other courts have similarly held that, to arrive at net loss, railroad retirement taxes must be deducted from gross wages. In *Boston & Maine R.R. v. Talbert*, 360 F.2d 286, 291 (1st Cir. 1966), the First Circuit stated: "The evidence of [plaintiff's] income taxes and railroad retirement contributions were also properly excluded in determining the present value of [plaintiff's] expectancy in his earning capacity." In *Rachel v. Consol. Rail Corp.*, 891 F. Supp. 428 (N.D. Ohio 1995), the court held that railroad retirement taxes must be deducted as a matter of law in computing lost earnings in FELA actions. *Id.* at 430. *See also Phillips v. CSX Transp. Inc.*, 190 F.3d 285, 287 (4th Cir. 1999) (noting that the district court granted CSX's motion to reduce the

damage award as a matter of law because the award failed to take into account railroad retirement payroll deductions).

Appellate courts in Virginia, Minnesota and Georgia have reached the opposite conclusion. They have limited *Liepelt* to "income taxes" and refused to allow evidence of railroad retirement taxes in determining future streams of income. *See Norfolk & W. Ry. Co. v. Chittum*, 468 S.E.2d 877, 882 (Va.), *cert. denied*, 519 U.S. 1034 (1996); *Marynik v. Burlington N. Inc.*, 317 N.W.2d 347, 351 (Minn. 1982); *Norfolk S. Ry. Co. v. Perkins*, 481 S.E.2d 545, 548-49 (Ga. Ct. App. 1997), *cert. denied* (Ga. May 9, 1997); *see also Norfolk S. Ry. Co. v. Bradley*, 772 So.2d 1147, 1153 (Ala. 2000) (noting that the trial court did not instruct the jury that railroad retirement taxes would have to be deducted from any alleged future wage loss); *cf. Maylie v. Nat'l R.R. Passenger Corp.*, 791 F.Supp. 477 (E.D. Pa. 1992) (*Liepelt* inapplicable to railroad retirement taxes), *aff'd*, 983 F.2d 1051 (3d Cir. 1992).

Courts in Pennsylvania, Michigan and Missouri have adopted yet another view. They hold that the railroad retirement taxes can be counted as losses where the employee does not separately claim the retirement pension as a loss. *See Troy v. Nat'l R.R. Passenger Corp.*, No. 94-3943, 1995 WL 450276, at *7 (E.D. Pa. July 27, 1995), *aff'd*, 92 F.3d 1173 (3d Cir. 1996); *Berryman v. Consol. Rail Corp.*, Civ. A. No. 94-3668, 1995 WL 517642, at *4 (E.D. Pa. Aug. 28, 1995); *Sparklin v. Consol. Rail Corp.*, No. Civ. A. 94-3680, 1995 WL 455843, at *8 (E.D. Pa. Jul 28, 1995); *see also Ward v. Consol. Rail Corp.*, No. 234619, 2003 WL 21854866, at *9 (Mich. Ct. App. Aug. 7, 2003); App. 8a-9a.

The rulings in these cases were erroneously premised upon *Maylie v. Nat'l R.R. Passenger Corp.*, 791 F. Supp. 477 (E.D. Pa. 1992). *Maylie* involved a situation in which the plaintiff sought to present the value of his pension as an item of damages, and the railroad objected. "Here, ... plaintiff

describes the pension as a benefit that plaintiff has lost as result of his accident." *Id* at 487. As one court aptly pointed out, the *Maylie* "court refused to subtract *Plaintiff's* retirement tax contribution from the measure of his lost income *solely because* railroad did not agree to allow Plaintiff to show the *value* of his lost retirement annuity." *Rachel*, 891 F. Supp. 430.

In the subsequent cases, however, there is no indication that the railroad blocked proof of the value of a lost pension. Instead, the courts simply invoke *Maylie* on the ground that the employee had not sought to recover for his pension at all. This is entirely self-contradictory: if the employee is not seeking recovery for a lost pension, then he has no rationale at all for recovering for retirement taxes that he will never need to pay.

This case is, again, illustrative. Here, Ramsey never proffered any loss of a railroad retirement annuity pension as a lost item of damages, and the railroad never objected to such evidence. *See* App. 8a ("He made no claim for lost retirement benefits."). On the contrary, the railroad proffered Ramsey's actual disability benefit, and made no objection to any other showing by Ramsey. Thus, to the extent *Maylie* was invoked, it was inapplicable. Indeed, this *Maylie* strand of case law exemplifies the confused reaction to the problem. These courts are not inclined to allow a reduction in the amount of railroad retirement taxes, and are now extending *Maylie* beyond its original rationale to reach that outcome.

The decision of the court of appeals in this case thus deepens the confusion among the courts on a matter of substantial and recurring importance. The issue of whether to deduct railroad retirement taxes from the award arises in every FELA case where lost wages are awarded. It therefore annually affects thousands of railroad workers and dozens of interstate railroads and involves millions of dollars in unnecessary "compensatory" expenses. There are 251,075

employees in the railroad service industry today.[6] In 2002, the railroads paid $1.9 billion in railroad retirement board taxes, or more than 5% of their total operating revenues.[7] While injuries to railroad employees have gone down by 67% in the last two decades,[8] FELA lawsuits have more than doubled.[9] The railroad industry bears annual costs of approximately one billion dollars in connection with FELA claims.[10]

Moreover, Missouri is ranked seventh among the fifty States in total number of freight railroad employees and a significant number of FELA cases are filed there. The FELA has broad venue provisions that allow an employee to initiate suit in state or federal court in any jurisdiction that the defendant is located. Because the railroads operate in nearly every state, the plaintiffs end up with a broad choice of

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[6] Railroad Service in the United States, Association of American Railroads (2002), *available at* http://www.aar.org/PubCommon/Documents/AboutTheIndustry/RRState_USSummary.pdf (last visited June 29, 2004).

[7] Analysis of Class I Railroads, Association of American Railroads (2002), *available at* www.aar.org/pubstoresv2/data/analysis2002.xls (last visited June 29, 2004).

[8] *Railroads: The Safe Way to Move*, Association of American Railroads (Jan. 2004), *available at* http://www.aar.org/pubcommon/documents/policy/safetydramatic2004.pdf (last visited June 29, 2004).

[9] Association of American Railroads, 1999 Claim and Litigation Report 3-3 (2000).

[10] *See id.* at 2-7.

jurisdictions. In fact, Missouri is known to be a magnet for FELA suits involving out-of-state accidents.[11]

In short, the imperatives of national uniformity in the application of the FELA warrant review of this recurring and important issue.

B. The Decision Below Is Inconsistent With the Decisions Under Analogous Statutory Schemes

The role of payroll taxes in determining lost wages is not an issue limited to the railroad industry. Analogous federal remedial statutes govern other industries, and decisions such as the opinion below on railroad retirement taxes are inconsistent with the decisions of numerous federal and state courts with respect to Social Security taxes.

For example, the Jones Act is based upon FELA, and is to be construed in tandem with that statute. *American Dredging Co. v. Miller*, 510 U.S. 443, 454-55 (1994); 46 U.S.C. § 688(a). In Jones Act cases, the courts have confronted the question of whether social security payments should be deducted from awards.[12] The Fifth Circuit has held that the Jones Act requires that social security taxes be deducted from gross wages to reach net wages. *See Madore v. Ingram Corp.*, 795 F.2d 1210, 1218 (5th Cir. 1986); *see also Burden v. Evansville Materials*, 636 F. Supp. 1022, 1041 (W.D. Ky. 1986), *aff'd*, 840 F.2d 343 (6th Cir. 1988).

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[11] *See Hearing on S. 837 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 106th Cong. (June 9, 1999) (statement of Gerard T. Noce, Defense Research Institute), *available in* 1999 WL 386174.

[12] The court below recognized the similarities between railroad retirement and Social Security taxes. App. 7a.

The Louisiana state courts, though located within the Fifth Circuit, are in conflict with that circuit and with each other on this issue of federal law. *Compare Cappiello v. Exxon*, 695 So.2d 1097, 1105 (La. Ct. App.-4 Cir. 1997) (trial court erred as a matter of law in failing to deduct employee's contributions to social security in Jones Act action), *with Parks v. Pine Bluff Sand & Gravel Co.*, 712 So.2d 905, 918-20 (La. App.-3 Cir. 1998) (under Jones Act, employee's contributions to social security should not be deducted from his calculations of lost wages).

The same issue has arisen under other federal statutory schemes similar to FELA. The Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and Death on the High Seas Act ("DOHSA"), 46 U.S.C. app. § 761 *et seq.*, permit injured parties to sue for compensation where their claims might otherwise be barred or impeded by the common law of torts. 33 U.S.C. § 905(b). The Fifth Circuit and other courts have held that social security taxes should be deducted from a LHWCA or DOHSA award. *See Hernandez v. M/V Rajaan*, 841 F.2d 582, 587-88 & nn.2-3 (5th Cir. 1988); *Tallentire v. Offshore Logistics*, 754 F.2d 1274, 1287 (5th Cir.), *rev'd on other gds.* 477 U.S. 207, *on remand*, 800 F.2d 1390, 1392 (5th Cir. 1986); *Sharian v. United States*, No. 98-4578, 2002 WL 31558047, at *3 (N.D. Cal. 2002); *Walden v. United States*, 31 F. Supp. 2d 1230, 1235 (S.D. Cal. 1998). While the New York state courts have followed this approach, *Escobar v. Seatrain Lines, Inc.*, 573 N.Y.S.2d 498, 502 (N.Y. App. Div. 1991), the New York federal district court has reached the opposite conclusion. *Roselli v. Hellenic Lines Ltd.*, 524 F. Supp. 2, 4 n.2 (S.D.N.Y. 1980).[13]

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[13] The leading treatise on damages reflects that social security taxes are to be subtracted from income figures in federal

(Continued ...)

Thus, the conflict presented here is not limited to FELA actions, but also exists under analogous federal statutory schemes. This Court has recognized that conflicting interpretations of analogous statutory schemes raise an issue worthy of this Court's review. *See, e.g., Begier v. IRS*, 496 U.S. 53, 57 n.2 (1990). Here, the conflict thwarts congressional intent that the measure of damages under these federal statutes be uniform regardless of the forum in which the suit is brought.

The issue is of real practical significance. In *Liepelt*, the Court believed that magnitude of the income taxes was sufficient to require an instruction even though such taxes amounted to only $2,100 per year, or 7.61% of plaintiff's gross salary. Today, railroad retirement taxes paid by the employee constitute 12.55% of the employee's gross earnings. For most Americans, this amount is larger than federal or state income taxes.[14] Accounting for railroad retirement taxes is thus an important issue in calculating damages in every FELA case.

In short, this petition presents this Court with an opportunity to resolve a conflict on a recurring issue of federal law. Over the last two decades, the state and federal

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actions. 1 *Stein on Personal Injury Damages*, § 3:12, at 3-34 (3d ed. 1997); *see also* Gerald E. Meunier, *Elements of Recovery In Maritime Personal Injury Cases*, 72 Tulane L. Rev. 805, 822-23 (Dec. 1997).

[14] For example, over the past decade, the average effective federal income tax rate for the first four quintiles of American taxpayers ranges no higher than 8.1%. GAO, *Effective Federal Tax Rates: 1979-2001* (April 2004), *available at* www.cbo.gov/showdoc.cfm?index=5324&sequence=0 (last visited June 29, 2004).

courts have adopted distinct and conflicting lines of authority in their efforts to apply this Court's decision in *Liepelt*. One position--adopted by the Fifth and First Circuits, two state courts and several federal courts--is that payroll taxes should be deducted from lost wages. A second position--followed by four state courts--is that such taxes should be deducted. The third position--followed by the court below and lower federal courts--holds that payroll taxes should not be deducted unless the plaintiff has asked to include the retirement benefits as a loss. This longstanding confusion concerning the proper application of the principles established in *Liepelt* can, of course, be resolved only by this Court. The compelling facts of this case present an appropriate context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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